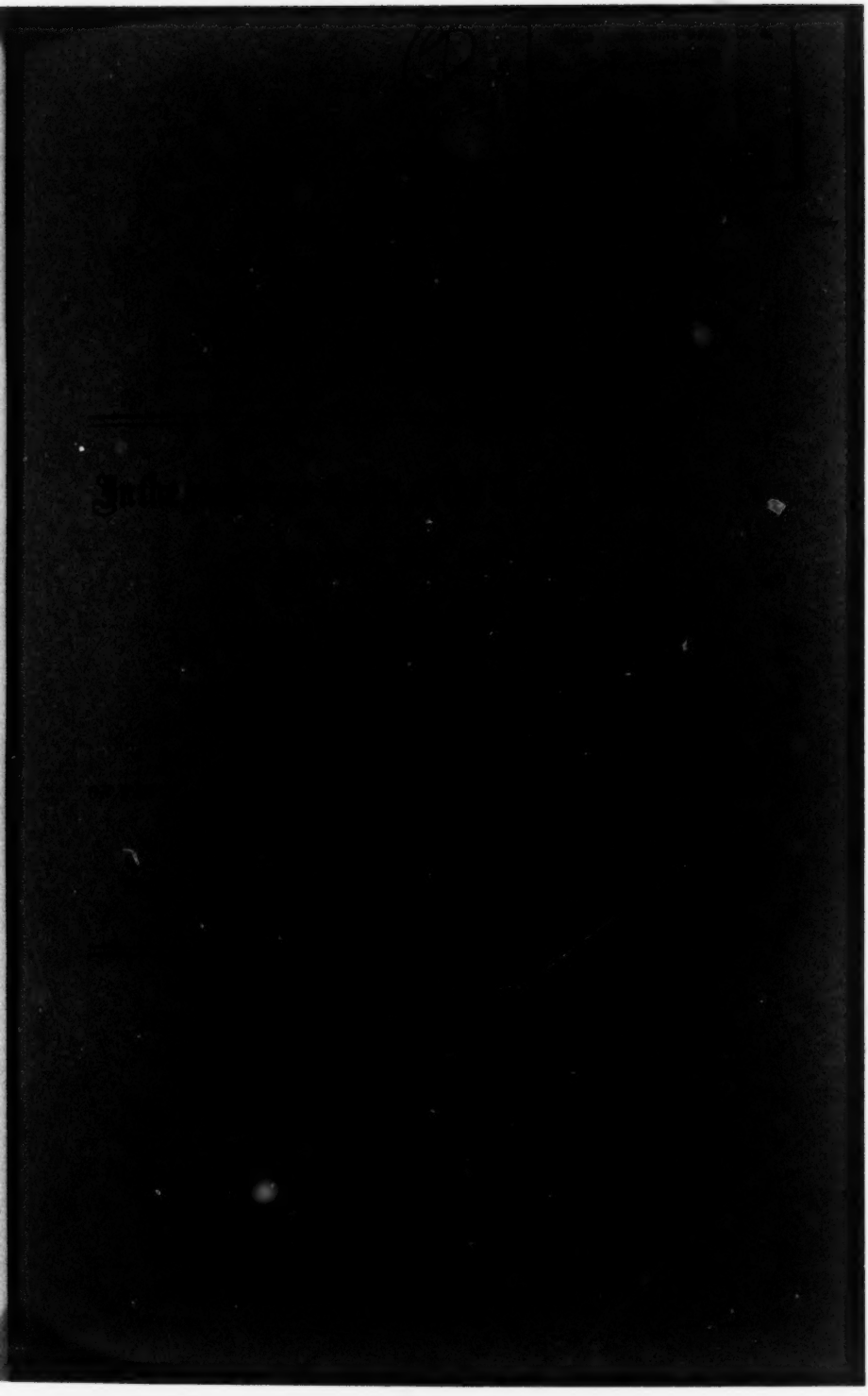

INDEX

CITATIONS

562712—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 456

CHARLES E. LEYDECKER, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 3–5) is officially reported in 97 C. Cls. 711.

JURISDICTION

The judgment of the Court of Claims was entered April 5, 1943 (R. 5). Petitioner's first motion to vacate judgment was filed on April 27, 1943, and overruled on April 28, 1943 (R. 6). Petitioner's second motion to vacate judgment and for leave to offer additional evidence was filed on July 21, 1943, and overruled July 29, 1943 (R. 6). The petition for a writ of certio-

rari was filed October 26, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.[1]

QUESTION PRESENTED

Whether the Court of Claims abused its discretion in denying petitioner's motions to vacate a judgment in his favor and for leave to offer additional facts alleged to show a right to greater recovery, where petitioner was aware of those facts almost a year prior to the entry of judgment but did not offer them to the court until after judgment.

STATEMENT

Petitioner, a commissioned officer in the United States Army, filed suit in the court below on November 8, 1940, for certain rental and subsistence allowances on account of a dependent mother (R. 1–2).[2] The matter was referred to a commissioner for a hearing and petitioner's proof was taken on March 3, 1941, no evidence being submitted by the

[1] The question of jurisdiction is discussed at pp. 6–7, *infra*.

[2] The Act of June 10, 1922, c. 212, 42 Stat. 625, 628, as amended by the Act of May 31, 1924, c. 224, 43 Stat. 250, and the Act of June 16, 1942, c. 413, 56 Stat. 359, 361, provides for the payment of rental and subsistence allowances to commissioned officers of the United States Army adjusted to their rank in the service. Higher allowances are provided for an officer with dependents, and a mother may in certain circumstances be a "dependent." Rental allowances do not accrue while the officer is assigned quarters at his permanent station unless such quarters are inadequate for occupancy by himself and his dependents.

Government. On March 6, 1942, the commissioner submitted his report to the court, finding that petitioner had been a commissioned officer since 1933 and a captain (temporary) since September 9, 1940; that petitioner's mother lived with him and was supported by him; and that adequate quarters had at all times been provided petitioner with the exception of one twenty-eight day period [3] in 1938 (Record in Court of Claims No. 45299, Report of Commissioner pp. 5–6).

After such report was filed, petitioner was apparently assigned new quarters on March 10, 1942, which it is now alleged were not adequate for an officer with dependents (Pet. 5), and he was promoted to the rank of major on May 16, 1942 (Pet. 7). Although these facts, if true, would have entitled petitioner to additional rental allowances and higher subsistence allowances, he made no attempt at that time to apprise the court of his changed circumstances.

On October 5, 1942, the case was submitted to the court without argument on the basis of the commissioner's report and the briefs of the parties (R. 2), both sides requesting special findings of fact in accordance with the commissioner's report (Record in Court of Claims, Plaintiff's Request for Findings of Fact and Brief, p. 9; Defendant's Request for Findings of Fact and Brief, p. 11). On

[3] The effect of this last finding, which was adopted by the court (R. 3–4), was to limit any recovery by petitioner for rental allowances to that period. See n. 2, *supra*.

December 7, 1942, the court filed its Findings, Conclusion of Law and Opinion which in effect incorporated the commissioner's report and found petitioner's mother to be dependent upon him for her support, entitling petitioner to the additional allowances provided by law for a dependent (R. 3–5). Judgment was suspended to await "a report from the General Accounting Office showing the amount due computed in accordance with" the court's Findings and Opinion (R. 5). Petitioner moved on December 10, 1942, for a call on the General Accounting Office to report the amount due petitioner in accordance with the court's decision (Record in Court of Claims). In response to such call the General Accounting Office submitted a report on March 4, 1943, which showed $1,119.53 to be due, stating that this covered all claims of petitioner for rental and subsistence allowances on account of a dependent mother from January 1, 1938, to December 7, 1942, the date of the court's decision (Record in Court of Claims; see R. 5). The report showed on its face that the subsistence allowances were calculated on the basis of a captain's rank rather than that of a major and that no rental allowance had been figured except for the twenty-eight-day period in 1938. Petitioner on April 1, 1943, moved for judgment in accordance with the report, and judgment was entered on April 5, 1943 (R. 5).

Thereafter, on April 27, 1943, petitioner moved to vacate the judgment (R. 6) on the ground that he was entitled to additional rental allowances because of the Government's failure to provide quarters during a portion of the period covered by his claim, presumably the period between March 10, 1942, and December 7, 1942, and on the ground that there had been a failure to compute his subsistence allowance on the basis of his actual rank. (See Appendix 1, *infra*, pp. 11–12.) This motion was overruled without opinion on April 28, 1943 (R. 6). Petitioner then requested and obtained a supplemental report of the General Accounting Office setting forth the additional allowances due him as a major (See Pet. 5; Appendix A), and on July 21, 1943, without leave of court, again moved to vacate judgment and for leave to offer additional evidence (R. 6). The grounds for the second motion were identical with those set forth in the first motion (See Appendix 2, *infra*, pp. 13–14), but also made reference to the supplemental report of the General Accounting Office. This motion was overruled without opinion on July 29, 1943 (R. 6).

ARGUMENT

Petitioner prays for a writ of certiorari to review the judgment of the court below (Pet. 1) but does not assert that on the basis of the evidence presented any error of fact or law was committed in rendering the judgment. The

only error assigned and argued is the overruling of petitioner's motion to vacate such judgment and receive additional evidence alleged to show a right to recover $133 more than was allowed (Pet. 2–3). The denial by the court below of petitioner's two motions to vacate the final judgment, based solely upon facts which were known to petitioner a year before the date of judgment and which could have been brought to the court's attention at several stages before the judgment, furnishes, we submit, no ground for review by this Court.

1. The judgment below was entered April 5, 1943, and the first motion to vacate was denied on April 28, 1943. The petition herein, filed October 26, 1943, is therefore out of time (28 U. S. C. § 350) unless the period for applying for a writ of certiorari was extended by the second motion, overruled July 29, 1943. Considered apart from the judgment itself, a motion to vacate, which is similar in effect to a motion for a new trial (*The Presbyterian Church of Glasgow, Mo.* v. *United States,* 44 C. Cls. 408; *Plumley* v. *United States,* 45 C. Cls. 185), is not appealable. *Pfister* v. *Finance Corp.,* 317 U. S. 144, 149; *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 535; *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 254. While a motion for a new trial will, if seasonably filed, extend the time for taking an appeal from the final judgment, petitioner's second motion would not

fall within that category, for it was filed more than "60 days from the time the judgment of the court" was announced, and in any event was not filed "by leave of court" (Court of Claims, Rule 91).[4] If the motion be considered in the nature of a request for leave to move for a new trial—the only motion petitioner could properly have filed at this point—it worked no extension of time for review of the judgment. *United States* v. *Seminole Nation,* 299 U. S. 417; *Morse* v. *United States,* 270 U. S. 151; *Gypsy Oil Company* v. *Escoe,* 275 U. S. 498. Moreover, the second motion was based on grounds identical with those advanced unsuccessfully for the first motion (see Appendices 1 and 2, pp. 11–14). The court's action on the first motion being *res judicata* as to the second (*Child* v. *United States,* 6 C. Cls. 44), the overruling of the second motion shortly after it was filed, without argument or opinion, indicates that the court below did not re-examine the "basis of the original" judgment, a requisite to extending the time for review. *Pfister* v. *Finance Corp., supra,* at pp. 150–151. A petitioner is certainly not entitled to protract the statutory time for filing a writ of certiorari by making successive motions for a new trial on identical grounds. No reviewable order is therefore, we believe, before this Court.

[4] The second motion also failed to meet formal and other requirements of a motion for a new trial based "upon the ground of newly discovered evidence" (Court of Claims Rule 95).

2. Even assuming that a reviewable order has been timely presented, there would be no basis for granting certiorari. Petitioner's sole complaint is of the refusal to receive additional evidence. But for newly discovered evidence to warrant a new trial, it must be shown by affidavit that such evidence could not by due diligence have been discovered earlier and produced at the trial (*Child* v. *United States,* 6 C. Cls. 44; *The Presbyterian Church of Glasgow, Mo.* v. *United States,* 44 C. Cls. 408; Court of Claims Rule 95).[5] No such proof was submitted by the petitioner, nor could it have been. Petitioner's promotion to the rank of major and the change of living quarters occurred a year prior to judgment, and he could easily have brought these changes to the attention of the court below at anyone of several stages: (1) at the submission of the case to the court after the commissioner's report was filed;[6] (2) after the interim

[5] Rule 95 of the Court of Claims also requires that the affidavit show that the newly discovered facts were unknown to either the party or his attorney until after the close of the trial and the reasons why such evidence could not have been discovered before the trial with due diligence.

[6] Upon submission of the case to the court below on briefs, the Government had suggested that since this was a continuing claim "entry of judgment be suspended until the coming in of proof showing whether or not plaintiff has continued to occupy with his dependent quarters furnished by the Government" (Court of Claims Record, Defendant's Request for Findings of Fact and Brief, p. 13). This was not acted on by either plaintiff or the court.

judgment of the court below, pending the report from the General Accounting Office; (3) after the report was filed, and prior to entry of judgment. Petitioner availed himself of none of these opportunities, but instead moved for judgment in accordance with the report of the General Accounting Office. Since such motion showed petitioner's complete satisfaction with the report and computation of the Comptroller General (*Ruf* v. *United States,* 87 C. Cls. 248), judgment was properly entered in accordance therewith. The facts upon which petitioner based his motions to vacate judgment having been known to him prior to judgment, there was no abuse of discretion in denying the motions to vacate that judgment. *Payne* v. *Colvin,* 276 Fed. 15 (C. C. A. 7), certiorari denied, 257 U. S. 652; *Donaldson* v. *Baltimore Acc. Corp.,* 47 F. (2d) 848 (C. C. A. 3); *Blue Diamond Co.* v. *Charles M. Allen & Son,* 56 F. (2d) 1 (C C. A. 5), certiorari denied, 287 U. S. 615.

CONCLUSION

No question of general importance is raised by the petition for a writ of certiorari. The facts are unique, and in view of the lack of diligence shown by petitioner, the action taken below in-

volved no abuse of discretion. It is respectfully submitted that the petition should be denied.

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DECEMBER 1943.